

June 11, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: Ex Parte Communication in *In re Lifeline and Link Up Reform and Modernization*,
WC Docket Nos. 11-42, 03-109 and 09-197**

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter provides notice that on June 8, 2015, the undersigned and Adam Shoemaker of Davis Wright Tremaine, LLP met, on behalf of True Wireless, LLC, with Travis Litman of Commissioner Rosenworcel's Office.

In our meeting with Mr. Litman, we explained that much of the criticism of the Lifeline program cannot be supported by the evidence, which shows that the program is decreasing in size and has an extraordinarily low rate of erroneous payments under the federal government's own IPERA standard. We also shared some suggestions for the future of the Lifeline program, including supporting broadband services and creating a national eligibility database based on the Supplemental Nutrition Assistance Program. We presented the attached slides during the meeting.

Mr. Shoemaker and I also discussed Lifeline support for Tribal areas with Mr. Litman. True Wireless is concerned that the Commission is considering a revision to the effective definition of Tribal lands in Oklahoma that will have immediate and substantial negative impacts, both on numerous Native Americans living in Oklahoma, and on True Wireless, without providing adequate notice and opportunity for comment, and without consulting affected Tribal nations. Commission rules have, for over a decade, clearly stated that qualified applicants residing in "any federally recognized Indian tribe's reservation, pueblo, or colony, including former reservations in Oklahoma..." are entitled to receive the additional Tribal Lifeline subsidy.¹ The definition has been consistently applied by the Commission and the Oklahoma Corporation Commission ("OCC") to include the entire state of Oklahoma, except for six counties and a portion of one additional counties, as reflected in the map found on the OCC

¹ 47 C.F.R. § 54.400(e) (emphasis added).

website at: <http://www.occeweb.com/pu/OUSF/2011OKTribalLandsMap.pdf> (a copy of this map is being provided for convenience).

The draft order being considered for the June 18 Commission meeting, as True Wireless understands it, would revise the definition of Tribal lands considerably by adopting a new map that carves out large swathes of land that has been treated unambiguously as Tribal lands for purposes of the Lifeline program for over a decade. This is a significant and substantive change in the Commission's rules and policies, requiring notice and comment, and cannot plausibly be adopted under the guise of clarification.² The fact that the Commission and the OCC have applied the existing rule to include the areas shown in the attached map as constituting Tribal lands for purposes of distributing Lifeline subsidies supporting basic telephone service for thousands of low-income Americans for over a decade necessarily means that any material change to the map is a substantive change. Under binding D.C. Circuit precedent, notice and comment is required if an agency adopts "a new position inconsistent with" its prior rules, or effects "a substantive change in the regulation."³ Moreover, the interpretative rule exception "is to be narrowly construed and only 'reluctantly countenanced.'"⁴ Merely characterizing a change in the definition of Tribal lands – a change that will have immediate and significant impacts on the public and on Lifeline service providers – as a clarification cannot insulate the Commission from the notice and comment requires of the Administrative Procedure Act.⁵ The Commission, the OCC, subscribers, Tribal nations, and ETCs have all relied on the current map of Tribal areas for over a decade. If the Commission wishes to replace that map with a new version that eliminates benefits for tens of thousands of Lifeline subscribers, it must provide notice and an opportunity for comment before it does so.

The matter currently before the Commission arises from the 2011 Notice of Proposed Rulemaking ("NPRM") leading up to the 2012 Lifeline Reform Order, and then the Further NPRM associated with the 2012 Reform Order. Neither in those notices nor elsewhere did the Commission give notice that it was planning to radically reshape the boundaries of what is considered Tribal lands in Oklahoma. Consequently, affected consumers, ETCs, the Oklahoma state government, and Tribal nations have had no opportunity to weigh in on the legal, policy, and practical considerations bearing on such a change. Revising the map of Tribal areas in this way will cause tens of thousands of Lifeline subscribers to lose service in Oklahoma. Given the profound effects this change will have on the Oklahoma Lifeline market, the lack of notice and comment is of serious concern.

Currently, these subscribers receive service packages that reflect and make use of the additional \$25 in assistance provided for Tribal lands (as compared with non-Tribal lands) under 47 C.F.R. § 54.403(a)(2). This means that the Lifeline support for the affected subscribers will be reduced by nearly 75%. Such a drastic reduction in support for these subscribers means that

² 5 U.S.C. § 553.

³ *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d 29, 35 (D.C. Cir. 2005).

⁴ *UPMC Mercy v. Sebelius*, 793 F. Supp. 2d 62, 69 (D.D.C. 2011).

⁵ *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d 29, 35 (D.C. Cir. 2005) ("An agency may not escape ... notice and comment requirements ... by labeling a major substantive legal addition to a rule a mere interpretation."); *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (holding that the FCC "may not bypass [the APA's notice-and-comment] procedure by rewriting its rules under the rubric of 'interpretation'").

many will be forced to forego telephone service altogether because they will not be able to afford the out-of-pocket payments to make up for the reduction in subsidy amount. Moreover, ETCs whose current service plans in Oklahoma are based on the subsidies associated with the longstanding boundaries of Tribal versus non-Tribal lands may be forced to offer much less beneficial plans as a result of the reduced subsidies.

Furthermore, the Commission would be violating its own policy if it were to implement this change without first consulting affected Tribal Nations which, to True Wireless's knowledge, the Commission has not done. The Commission has previously committed to "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."⁶ Aside from simply being an appropriate policy on its own merits, the Commission's adoption of this approach was likely based on a consideration of several executive orders that direct Executive branch agencies to incorporate Tribal consultation into their processes and procedures.⁷ Tribal leaders that True Wireless has contacted have indicated that they have not been consulted with or even notified of the proposed change to the Oklahoma Tribal map. Whatever the policy and practical merits of revising the effective definition of Tribal lands in Oklahoma, making such a major change without consulting the affected Tribal governments is unnecessarily disrespectful of their longstanding and legitimate interests in ensuring that members of their respective Tribes receive all federal benefits to which they are entitled.

Please contact me if you have any questions regarding this filing.

Respectfully submitted,

/s/ Danielle Frappier

Danielle Frappier
Counsel to True Wireless, LLC

Cc: Travis Litman

⁶ *In Re Statement of Policy on Establishing A Gov't-to-Gov't Relationship with Indian Tribes*, 16 FCC Rcd 4078 (FCC rel. June 23, 2000).

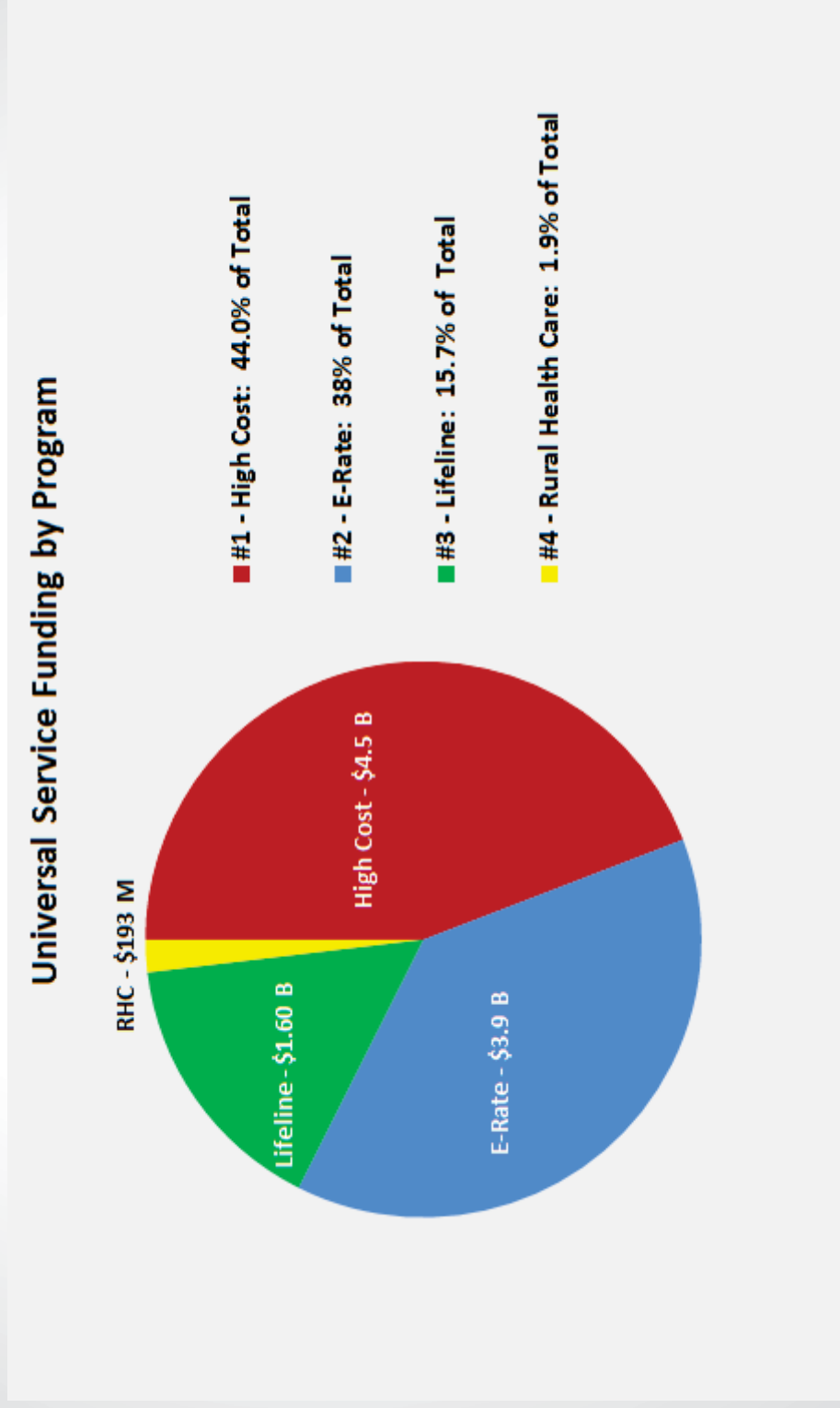
⁷ Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); President's Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009).

The Lifeline Program: An Update on Reforms and a Perspective on Further Changes

May 28, 2015



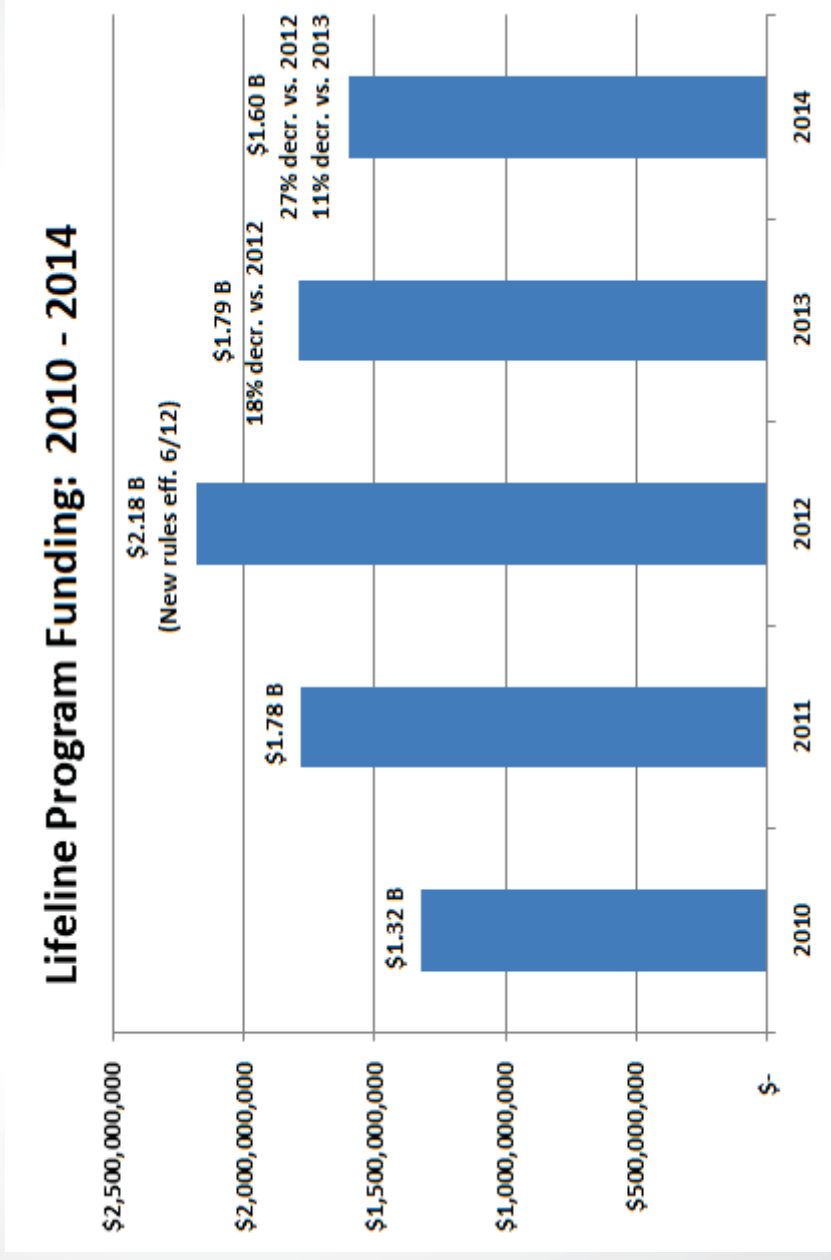
Putting the Lifeline Program in Perspective



The High Cost/CAF and E-rate programs account for over 80% of USF spending.

Amounts above reflect 2014 spending for Lifeline and RHC, and 2015 program levels for High Cost and E-rate.

The Monetary Effects of the 2012 Reforms and an Improving Economy



Discussions of “explosive growth” are based on data from more than three years ago.

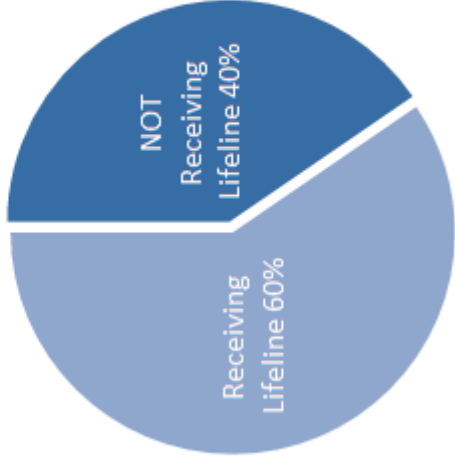
There has been a **de facto budget since 2012** (no new approvals of compliance plans, FCC states), and it has led to undersubscription.

Lifeline Enrollment

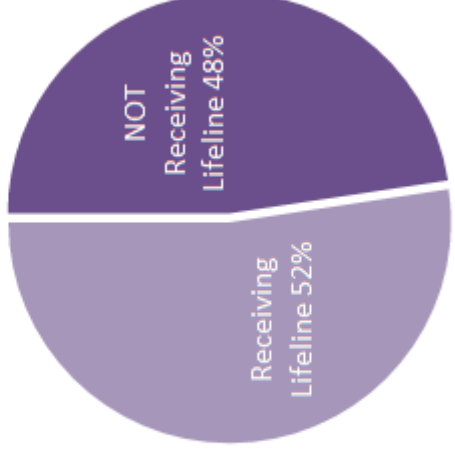
About 40% Unserved as of 4Q 2014



All States--Qualified Households



FCC States--Qualified Households



Now that the NLAD has eliminated duplicates and prevents new ones from occurring, and the 2012 reforms have been implemented, the program should focus on its critical mission: **serving the needs of the low income population.**

Sources

Lifeline:

<http://www.usac.org/about/tools/fcc/filings/2015/q1.aspx>

SNAP:

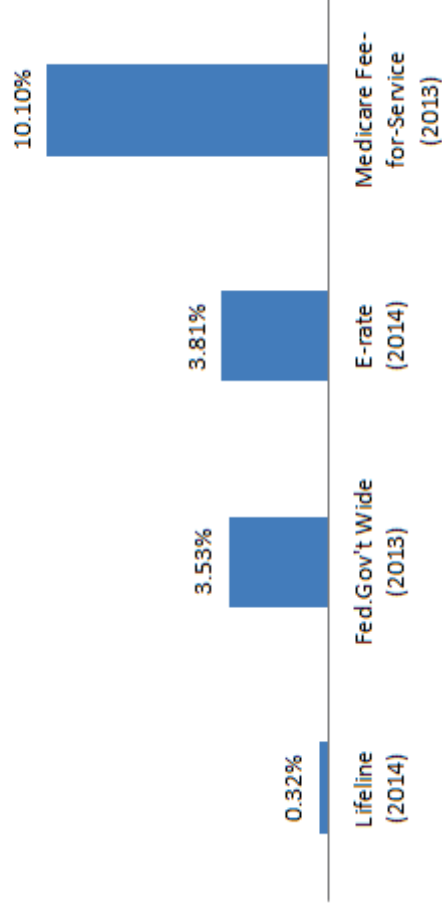
<http://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap>

But What About Waste, Fraud and Abuse?



Media hype and “gotcha” infotainment stories often overshadow the federal government’s own data that reflect a high level of compliance.

Improper Payments (IPERA)



Source: FCC Fiscal Year 2014 Agency Financial Report at Table 1;
www.paymentaccuracy.gov

Even where payments have found to have been improper “...the vast majority of improper payments are due to unintentional errors.”

www.paymentaccuracy.gov/about-improper-payments (emphasis added)

High Level of Compliance

The Results of the “Biennial” Audits



- Over 25 Lifeline ETCs were audited as required in 2012 Lifeline Reform Order
- Audited operations in 2013
- Reports were publicly filed with the FCC
- \$37M in Lifeline payments audited
- \$10K in monetary findings, or 0.03% of total

Further Reforms Needed



- Guiding principle: driven by facts and current data, not politics

1. Broadband services should be supported

- Including broadband offerings entirely covered by the subsidy—the Lifeline broadband pilot demonstrated that this is **key** to increasing broadband adoption among low income consumers
- Critiques that the subsidy was never “meant” to cover all costs glosses over the fact that the subsidy level was never raised to meet market prices
 - ETCs focusing on the low income market constructed an offering that could be provided at the capped subsidy level

Further Reforms Needed



1. Broadband services should be supported (continued...)

- Lifeline is the only USF program that does not have broadband deployment as its focus
- USF funds should support an ever-evolving level of service consistent with Sec. 254 of the Act, while remaining cognizant of
 - the needs of vulnerable populations and
 - what is feasible from an economic and technological standpoint
- Addressing the homework gap will require at-home broadband access

Further Reforms Needed



1. Broadband services should be supported (continued...)

- A stagnant subsidy amount is incompatible with the goal of providing an ever-evolving level of service for low income Americans
- Worse, the current \$9.25 was set by averaging the 2011 rates set for copper wireline, plain old telephone service. *2012 Lifeline Reform Order* at para. 53.

Further Reforms Needed



2. Database Access to Eligibility Information

- If a national Lifeline eligibility database is unlikely in the next year (it was originally slated for end 2013!), then efforts should be made to assist ETCs in gaining access to existing databases, such as SNAP
 - SNAP is the basis for over 90% of enrollments
- Collaboration between industry and Commission on ways to solve the database issue
- For example, a model contract that the ETC and state SNAP administrators could enter into would greatly advance goal of automating eligibility determination
 - Privacy and security measures blessed by the FCC and FNS would give administrators and ETCs the confidence that the contractual provisions are sufficiently stringent

Further Reforms Needed



3. Text (send or receive) should count as usage

- The point of the usage rule is to confirm that the subscriber still wants the service
- If a written or oral confirmation by the subscriber can count as usage, there is no reason that text should not count. (None are supported services—that’s beside the point.)
- The support for TracFone’s petition on this issue was strong.
 - Petition referenced in Public Notice DA 14-1591.

Further Reforms Needed



4. ETCs should be required to keep copies of proof of eligibility
 - Copies of SNAP cards, Medicaid cards, etc.
 - For limited period (90 days) to permit USAC/FCC to audit compliance
 - Eliminates the “rogue agent” problem
 - Privacy concerns can be resolved with advance, informed consent
 - Security protocols based on commercially-reasonable practices, and can be further addressed in upcoming Commission proceeding



Information source: <http://www.usac.org/li/low-income/eligibility/tribal.aspx>

- Beaver
- Cimarron
- Texas
- Greer
- Harmon
- Jackson
- Beckham County South of the North Fork of the Red River

